**United States District Court**
**For The District of Columbia**

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| **United States of America,**<br><br>**v.**<br><br>**Mahailya Pryer,**<br><br>**Defendant.** | **Case No. 21-cr-00667-RCL-ZMF-2** |

## Reply in Support of Motion to Terminate Probation and Response in Opposition to Government Motion for Resentencing

In its opposition to Ms. Pryer's motion for early termination of probation, the government asks this Court to resentence Ms. Pryer. Through resentencing, the government apparently seeks to relitigate the facts of Ms. Pryer's offense and the circumstances of her guilty plea and alleged probation violations. *See* Gov't Opp. at 1-5, ECF No. 80 (Dec. 1, 2023) (detailing facts of Ms. Pryer's offense and alleged probation violations).

As an initial matter, the government cites no authority for its request that this Court resentence Ms. Pryer. Indeed, no such authority exists given the current posture of Ms. Pryer's case. Ms. Pryer is not before this Court for resentencing and therefore those cases to which it cites discussing increased penalties after an appeal have no applicability here. *See* Gov't Opp. at 7, 9 (citing *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980) (remanded after government appeal); *Davenport v. United States*, 353 F.2d 882, 884 (D.C. Cir. 1965) (reversed and remanded for resentencing after defendant appeal of Fed. R. Crim. P. 35 denial); *United States v. Bohn*, 959 F.2d 389, 394–95 (2d Cir. 1992) (vacated and remanded after defendant appeal)). Ms. Pryer is also not before this Court upon a Federal Rule of Criminal Procedure 35 or 36 motion to correct

her sentence for clear error, a clerical error, or an error arising from oversight or omission. *See id.* at 6-7 (*citing Burns v. United States*, 552 F.2d 828, 831 (8th Cir. 1977) (addressing increase in sentence made pursuant to Rule 35); *Bozza v. United States*, 330 U.S. 160, 166–67 (1947) (addressing correction of "inadvertent error" by imposing a mandatory fine within 5 hours of original sentence of imprisonment, *i.e.*, clearly within the time frame of Rule 35); *Hayes v. United States*, 249 F.2d 516, 517–18 (D.C. Cir. 1957) (addressing correction of error that was "inadvertent")). In fact, this case readily distinguishes itself from *Hayes* and *Bozza* because this is no case of "inadvertence"—the government and this Court were on notice at sentencing that a split sentence was statutorily invalid because Ms. Pryer strenuously argued against it.

Instead, the interests of justice warrant termination of Ms. Pryer's probation. As the government concedes, now that she has served her imprisonment, Ms. Pryer's probation is illegal under *United States v. Little*, 78 F.4th 453 (D.C. Cir. 2023). *See* Gov't Opp. at 6. Her conviction is for a petty offense for which the maximum possible term of imprisonment is 6 months, or 180 days. The government's own sentencing chart shows that, overwhelmingly, petty offenders convicted under 40 U.S.C. § 5104 receive probation alone, and when in prison, do not spend the amount of time Ms. Pryer has spent in custody.

As of August 25, 2023,[1] there were 341 cases where January 6 defendants were sentenced under 40 U.S.C. § 5104; the mode of days of custody (*i.e.*, the number that occurs most often) was **zero**, the median days in custody (*i.e.*, the value in the middle of all cases) was **zero**, and the

[1] This is the most recent date for which a full statistical analysis of § 5104 cases alone was completed, but there is no reason to believe it has changed significantly, other than to increase the number of cases. The full sentencing chart is available here: https://www.justice.gov/file/1594006/download.

mean days of custody (*i.e.*, the average) was **15 days**. A full 197 cases out of the 341—*i.e.*, **nearly 60 percent**—received no term of incarceration at all. And of those, 110 received straight probation or a fine, while only 87 received *any* period of home detention.

In contrast, Ms. Pryer has now served 81 days in custody (45 days of prison time and 36 days of custody for alleged violations). She has been on probation for 10 months (not including the 36 days in custody for alleged violations), including 30 days on home incarceration (of which 21 days was an inpatient treatment program), and 63 days on home detention. This is the equivalent of a 13-month sentence.[2] This is more than enough punishment for a single petty misdemeanor punishable by a six-month term. Indeed, the punishment Ms. Pryer has already suffered makes *Hayes* and *Bozza* even more inapposite. Each speaks of "escap[ing] punishment" *Bozza*, 330 U.S. at 166, and "immunity for the prisoner," *Hayes*, 249 F.2d at 518. In no way has Ms. Pryer escaped or been immune from punishment for her § 5104 offense. Far from it. At this

[2] The government appears to admit that Ms. Pryer's time on probation should offset any potential additional incarceration. *See* Gov't Opp. at 14-15 (defendant's "'term of supervised release restrained his liberty for a known period of time that can be credited against any future sentence of imprisonment'") (quoting *United States v. Lominac,* 144 F.3d 308, 318 (4th Cir. 1998)); *see also Lominac*, 144 F.3d at 317 ("[b]ecause the Attorney General, under the statutory framework, cannot credit Lominac for time served on the unconstitutional term of supervised release, the district court on remand will give Lominac credit for that time against any new prison sentence").

The government later cites *Lominac* to instead say that a one-to-one ratio is not necessary, *see* Gov't Opp. at 16 n.5, but the actual holding of *Lominac requires* a one-to-one ratio: "On remand, however, any prison time that Lominac receives under a resentence must be reduced by the time he has already served for violating his release, that is, his six months in prison and the time he has served under the (new) unconstitutional term of supervised release." *Lominac*, 144 F.3d at 317.

point, her time in custody and on probation far exceeds that of the vast majority of those sentenced for identical crimes.[3]

Even if Ms. Pryer was properly before this Court for resentencing–which she is not–the government is wrong that this Court may increase the term of imprisonment Ms. Pryer has already served because "the *Lange/Bradley* rule applies only where the alternative penalty imposes the maximum authorized sentence and is satisfied in full." Gov't Opp. at 13. The *Lange* Court considered the precise scenario before this Court today, and made clear that double jeopardy is meaningless if the government's arguments as to resentencing prevail: "[I]f the judgment of the court is that the convict be imprisoned for four months, and he enters immediately upon the period of punishment, can the court, after it has been fully completed…vacate that judgment and render another, for three or six months' imprisonment, or for a fine? Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal is manifest." *Lange,* 85 U.S. at 168. It then underscored the same, tying it directly to the protection against double jeopardy: "But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction [against double jeopardy] of any value?" *Id.* at 173. It is manifestly not. Notably, the government's reading of *Lange/Bradley* is

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[3] The government argues that "[s]entencing is not 'a game in which a wrong move by a judge means immunity for the prisoner.'" Gov't Opp. at 15 (citing *Bozza v. United States*, 330 U.S. 160, 166-67 (1947). There is no possibility for "immunity" for Ms. Pryer as she has already been imprisoned for months while also serving a sentence of probation. If there is a "game" that has been played, it has been one-sided as the government has already enforced a more severe penalty against Ms. Pryer than the law allows and now seeks additional punishment because Ms. Pryer's probation has not been formally vacated or terminated.

undermined by the Supreme Court itself, which underscored in *DiFrancesco* its holding in *Lange* "that to impose a year's imprisonment (the maximum) after five days had been served was to punish twice for the same offense." *DiFrancesco*, 449 U.S. at 38–39 (citing *Lange*, 85 U.S. at 175). Same too here. To impose up to the maximum sentence after Ms. Pryer had served her sentence of imprisonment is "to punish twice for the same offense." *Id.*

This holding resonates in D.C. Circuit case law as well, which, unlike the cases cited by the government, is binding on this Court. In *Tatum v. United States,* 310 F.2d 854 (D.C. Cir. 1962), the D.C. Circuit held—citing, *inter alia*, *Lange* and *Bradley*—that "[i]f appellant's first sentence was lawful a second sentence could not lawfully be imposed which increased it or made it more severe, once he had commenced serving confinement under it." *Id.* at 855. Ms. Pryer's imprisonment sentence was lawful in and of itself and has already been served; it cannot now be increased. All that remains is her partially completed term of probation, which is illegal and must be terminated.

The government claims that the *Lange* and *Bradley* principle has been narrowed and made inapplicable here, Gov't Opp. at 12, but *Lange* and *Bradley* precisely address those situations where alternative punishments are imposed for a single criminal act. Any "narrowing" claimed by the government is not narrowing at all but instead applying *Lange/Bradley* to scenarios unlike Ms. Pryer's. Indeed, *Jones v. Thomas*, 491 U.S. 376 (1989), which the government asserts limits *Lange* and *Bradley*, did no such thing. Rather, it addressed whether to *extend* the principle of *Lange* and *Bradley* to multi-count cases, which split the Supreme Court 5-4. All nine justices agreed on the continuing viability of *Lange* and *Bradley* regarding a single count of conviction. *See Thomas*, 491 U.S. at 384 ("*Bradley* and *Lange* both involved alternative punishments that were

prescribed by the legislature for a single criminal act. The issue presented here, however, involves separate sentences imposed for what the sentencing court thought to be separately punishable offenses, one far more serious than the other."). The division among the justices was whether the *Lange/Bradley* principle would be extended to multiple-count situations; the viability of *Lange* and *Bradley* was never in doubt.

Notably, ten of the twelve federal circuit courts, including the D.C. Circuit in *Tatum*, have had occasion to rely on the *Lange/Bradley* line of cases. *See, e.g., United States v. Holmes,* 822 F.3d 481 (5th Cir. 1987) (discharging term of imprisonment where punishments were available in the alternative and fine was already paid); *United States v. DiGirlomo,* 548 F.2d 252, 254-55 (8th Cir. 1977) (same); *United States ex rel. Kanawha Coal Operators Ass'n v. Miller,* 540 F.2d 1213 (4th Cir. 1976) (same); *United States v. Sampogne,* 533 F.2d 766 (2d Cir. 1976) (same); *United States v. White,* 980 F.2d 1400 (11th Cir. 1993) (discharging fine where punishments were available in the alternative and term of imprisonment was already served); *Tatum,* 310 F.2d at 855; *Dye v. Frank,* 355 F.3d 1102, 1108 (7th Cir. 2004); *Breest v. Helgemoe,* 579 F.2d 95, 101 n.12 (1st Cir. 1978); *Warnick v. Booher,* 425 F.3d 842, 847 (10th Cir. 2005); *United States v. Edick,* 603 F.2d 772, 776-78 (9th Cir. 1979). Rather than *Lange* and *Bradley* retreating into obsolescence, these Supreme Court precedents address precisely the situation Ms. Pryer finds herself in: punished twice by two alternative disjunctive punishments for a single act.

The multi-count/single-count distinction also gravely undermines the government's reliance on the sentencing package doctrine. Gov't Opp. at 8-9. In justifying its request for resentencing, the government invokes the "sentencing package doctrine" to argue that the "components" of Ms. Pryer's "dual sentence were interdependent, and both were vital to the

Court's overarching plan," which thereby necessitates resentencing for the court to "correct the illegality." Gov't Opp. at 6, 9. Even if Ms. Pryer were properly before this Court for resentencing–which she is not–the sentencing package doctrine would have no application here.

The government relies on *United States v. Townsend*, 178 F.3d 558 (D.C. Cir. 1999), which explains that "'when a defendant is found guilty on a *multicount* indictment, there is a strong likelihood that the district court will craft a disposition in which the sentences on the various counts form part of an overall plan,' and that if some counts are vacated, 'the judge should be free to review the efficacy of what remains in light of the original plan.'" *Id* at 567 (emphasis added and cleaned up).

These same considerations do not exist when a defendant is sentenced for a single count of conviction that, by definition, does not involve distinct crimes that each outlaw separate conduct and each carry separate penalties that might interlock in an overarching plan. Indeed, *Townsend* distinguished *Lange* and *Bradley* on this very basis: the latter each involved a single count, the former multiple counts. 178 F.3d at 570. *Townsend* thus has nothing to say about Ms. Pryer's two alternative mutually exclusive punishments for a single offense.

To be sure, Ms. Pryer recognizes the need for "carefully crafted punishment" and that appellate courts allow for adjustment of a "sentencing scheme where one portion" is invalidated. Gov't Opp. at 6, 7. But Ms. Pryer has not appealed and her single petty offense conviction did not implicate a "sentencing scheme" simply because it was originally erroneously punished by probation and imprisonment.

In contrast to multicount sentences that are, "in essence, one unified term of imprisonment," *Townsend,* 178 F.3d at 570, probation and imprisonment are not unified at all:

they are mutually exclusive alternative sentences imposed on a single count of conviction. This is exactly the lesson of *Little*: "Probation and imprisonment are alternative sentences that cannot generally be combined." 78 F.4th at 454. *See also United States v. Mandarelli*, 982 F.2d 11, 12 (1st Cir. 1992) (then Chief Judge Breyer writing: "Under the Sentencing Reform Act of 1984, 'probation' is an *alternative* to prison; a defendant may *not* be sentenced *both* to probation and 'at the same time to a term of imprisonment.' 18 U.S.C. § 3561(a).").

The government's invocation of sentencing package theory is also unfaithful to the history of this case. When Ms. Pryer was originally sentenced, there was no discussion of how much imprisonment would be appropriate *in relationship* to how much probation would be appropriate, or vice versa. Rather, Ms. Pryer sought the least restrictive sentence available—probation—while objecting to imposition of a split sentence that would include imprisonment, whereas the government advocated for a "sentence of three months' incarceration followed by a three-year term of probation, sixty hours of community service, and $500 restitution." *See* ECF No. 46 (Defendant's Sentencing Memorandum); ECF Nos. 44, 48 (Government's Sentencing Memorandum and Supplemental Memorandum). The parties nowhere discussed whether the term of imprisonment should increase or decrease in proportion to the term of probation. It is disingenuous for the government to now suggest that *Little* affirmed this supposed calibration when it in fact simply clarified what was always true—namely, that a court cannot impose probation and imprisonment for a single offense. *Little*, 78 F.4th at 461.

Even if the Court's intent had been to sentence Ms. Pryer to imprisonment followed by postconviction monitoring, given the settled federal sentencing regime[4], the legal effect of Ms. Pryer's sentence was "double punishment" for a single offense consisting of a sentence of probation and a separate sentence of imprisonment. *Little*, 78 F.4th at 458; *id.* at 458-59 ("[P]robation is a standalone sentence combinable only with a fine, not with imprisonment," whereas imprisonment is a different standalone sentence of which supervised release is the component for "postconfinement monitoring." (quoting *Johnson v. United States*, 529 U.S. 694, 696-97 (2000)). The government's invocation of sentencing package doctrine as a basis for further increasing Ms. Pryer's imprisonment would only compound this error, requiring Ms. Pryer alone to bear the burden of it and resulting in a one-way ratchet upwards on her sentence.

The government nevertheless insists that this Court resentence Ms. Pryer and convert probation that she has already served into an equivalent amount of imprisonment. Gov't Opp. at

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[4] Under 18 U.S.C. § 3562, probation serves all of the statutory purposes of sentencing—one of which is punishment—whereas under 18 U.S.C. § 3582, imprisonment serves the very same statutory purposes of sentencing as probation, with the important exception that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582. Thus, assuming Ms. Pryer's sentence of probation plus imprisonment was calibrated to achieve the statutory purposes of sentencing that neither one could achieve alone, probation and imprisonment should never have been imposed toward such an end for a single offense. Contrary to the government's position, probation and imprisonment do not operate interdependently to satisfy all of the statutory purposes of sentencing; for a single offense, they operate completely independently to satisfy distinctly different statutory purposes of sentencing, while also satisfying some of the same such purposes.

In contrast to probation, supervised release does operate interdependently with imprisonment, so that the two components complement one another. Imprisonment serves all of the statutory purposes of sentencing except "promoting correction and rehabilitation" 18 U.S.C. § 3582, which are more appropriately satisfied through supervised release. In comparison, supervised release serves all statutory purposes of sentencing except retribution and incapacitation, as codified in 18 U.S.C. § 3583, which are more appropriately satisfied through imprisonment.

14-15, 16 n.5. Sentencing package doctrine does not provide for the conversion of a disallowed penalty so that it can be added to an allowed one—it only provides for rebalancing of the complementary penalties between *multiple* counts. *See Townsend*, 178 F.3d at 570. The outcome the government seeks is simply an end-run around *Little* that this Court should reject.

The government argues that under *United States v. Versaglio*, 85 F.3d 943, 949 (2d Cir. 1996), a "sentencing court may revise upward one component of sentence after another related component was invalidated so long as the 'aggregate sentence was not so severe as to create an undue risk of deterring others from subsequent challenges to sentence components that might be unlawful.'" Gov't Opp. at 9. In *Versaglio*, the defendant was sentenced to a fine and imprisonment for a contempt conviction and promptly paid the fine. *Versaglio*, 85 F.3d at 945. He subsequently appealed on the grounds that the contempt statute only allowed for a fine *or* imprisonment and his sentence therefore violated double jeopardy under *Lange* and *Bradley*. *Id.* The Second Circuit agreed and held that because the defendant had already paid the fine, he could not be imprisoned. The court further held, however, that nothing in *Lange* or *Bradley* prevented the district court on remand from increasing the fine, which had not originally been set at the statutory maximum. *Versaglio*, 85 F.3d at 948.

*Versaglio* is distinct from Ms. Pryer's case, foremost, because she is not before the court for resentencing, and that is because she did not appeal her original sentence. This is significant because under the law in this Circuit, "application of the double jeopardy clause to an increase in a sentence turns on the extent and legitimacy of a defendant's expectation of finality in that sentence" and a defendant's appeal necessarily bears on that expectation. *See United States v. Fogel*, 829 F.2d 77, 87 (D.C. Cir. 1987) ("If a defendant has a legitimate expectation of finality,

then an increase in that sentence is prohibited. ..."); *see also Jones*, 491 U.S. at 394 (Scalia, J., dissenting) (stating that the relevant question for double jeopardy inquiry is 'whether the addition[al punishment] upsets the defendant's legitimate 'expectation of finality in the original sentence'" (quoting *DiFrancesco*, 449 U.S. at 139).

Thus, *Fogel* recognizes that a court can increase defendant's punishment "following a retrial and reconviction for the same offense," or in the course of a "government appeal of the sentence," or "if necessary to comply with a statute." *Fogel*, 829 F.2d at 85, 87. But *Fogel* also holds that a court cannot increase a defendant's sentence where doing so "[is] not necessary to bring the sentence in compliance with any statute" as a defendant has an "expectation of finality in the severity of a sentence that is protected by the double jeopardy clause." *Id.* at 88. Here, it is not necessary to increase Ms. Pryer's imprisonment to bring her sentence into compliance with the law—the imprisonment portion of her sentence complies with the law. Rather, increasing her incarceration would upend the legitimate expectation of finality in the severity of her sentence. In this regard, the government's theory that sentencing package doctrine supports resentencing and additional imprisonment for Ms. Pryer is inconsistent with *Fogel* and should be rejected.

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The interests of justice demand that Ms. Pryer's unlawful probation be terminated. The government concedes that the Court has no authority to give two alternative and mutually exclusive sanctions for a single offense. The government recognizes that one such sanction—imprisonment—has been served. It must therefore be that the remaining sanction—probation—is a nullity. And with probation a nullity, the alleged violations should have no bearing on

whether this Court should terminate probation in the interests of justice. Probation should be terminated because it is unlawful and a double punishment that violates the Double Jeopardy Clause.

This Court should decline the government's invitation to resentence Ms. Pryer to more time in prison and instead order Ms. Pryer's probation terminated as an illegal sentence under *Little*.

Respectfully submitted,

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